IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA,
Respondent.

No. ~~979~~ 29

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

The petitioners seek a writ of certiorari to bring up for review a criminal case tried in the Superior Court of Caldwell County, North Carolina, in which they were convicted of bigamous cohabitation in violation of Section 4342 of the Consolidated Statutes of North Carolina. The conviction was affirmed by the Supreme Court of North Carolina in an opinion filed December 10, 1941, which is reported as *State* v. *O. B. Williams and Lillie Shaver Hendrix*, 220 N. C. 445.

Facts

The petitioners were indicted for bigamous cohabitation under Section 4342 of the Consolidated Statutes of North Carolina, the pertinent provision of which is as follows:

"If any person, being married, shall contract a marriage with any other person outside of this State, which marriage would be punishable as bigamous if contracted within this State, and shall thereafter cohabit with such person in this State, he shall be guilty of a felony and shall be punished as in cases of bigamy."

The evidence showed that on May 30, 1916, the petitioner, O. B. Williams, was married to Carrie Wyke Williams, and that they lived together as husband and wife in Caldwell County, North Carolina, until about May 7, 1940. (R. 3). It was also shown that the petitioner, Lillie Shaver Hendrix, was married to Thomas Hendrix about twenty years prior to this action and that they lived together as husband and wife in Caldwell County, North Carolina, until May, 1940. (R. 3).

On August 26, 1940, O. B. Williams obtained a decree of divorce from the bonds of matrimony from his wife, Carrie Williams, in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark. (R. 34). In this divorce action Carrie Williams was not personally served with process in the State of Nevada and made no appearance, although she was served with summons in North Carolina by the Sheriff of Caldwell County, North Carolina. (R. 33).

On October 4, 1940, a decree of divorce was entered in the Eighth Judicial District Court of the State of Nevada in and for the County of Clark dissolving the bonds of matrimony subsisting between the petitioner, Lillie Hendrix, and Thomas Hendrix. (R. 16). In this action, Thomas Hendrix, was served by publication (R. 15-16), but he was not personally served within the State of Nevada and made no appearance.

Both Carrie Williams and Thomas Hendrix were domiciled in North Carolina at the time of these divorce actions.

On October 4, 1940, the petitioners, O. B. Williams and Lillie Shaver Hendrix, contracted a marriage in Las Vegas, Nevada. (R. 4). Thereafter, they returned to North Carolina, lived together as man and wife, and established a home in Pineola, North Carolina. (R. 7).

The trial of this case proceeded upon the theory that, under the Constitution of the United States, the Courts of North Carolina are not obliged to recognize divorce decrees obtained in another state against North Carolina defendants when the other state is not the state of matrimonial domicile and the North Carolina defendants are not personally served with process in the State where the divorce decrees are granted. The North Carolina Supreme Court accepted this view of the case and held that the Nevada divorce decrees and the Nevada marriage did not constitute a defense to this prosecution.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD BE DENIED, FOR THE FEDERAL QUESTIONS PRESENTED HAVE ALREADY BEEN DECIDED ADVERSELY TO THE PETITIONERS

It is not disputed that federal questions, *viz.*, whether the Nevada divorce decrees were entitled to recognition in North Carolina under Article IV, Section 1, and Amendment 14 of the Constitution of the United States, were decided in the trial of this case in the State Court. However, under the rules of this Court review on writ of certiorari is a matter not of right but of discretion. The fact that the federal questions decided in the State Court have previously been decided adversely to the contentions of the petitioners is a sufficient reason for denying the writ.

The single question presented by this case is whether a decree of divorce granted in a state which is not the state of matrimonial domicile, in which the defendant is not domiciled, and in which the defendant is not personally served with process and makes no appearance is entitled to obligatory recognition in other states. If this question is to be answered in the affirmative, the Nevada divorces and subsequent marriage of the petitioners constituted a defense to the prosecution in North Carolina. Otherwise, they did not.

It is respectfully submitted that this question has been answered in the negative by the decision of this Court in *Haddock* v. *Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. ed. 867. In that case, an action had been brought in New York by a wife to obtain a legal separation from bed and board and alimony from her husband. The husband set up as a defense a divorce obtained by him in Connecticut. It was found as a fact that the marriage had been celebrated in New York, that the husband had abandoned the wife in New York, and that he had established a domicile and obtained a divorce in

Connecticut, the wife in New York being served only by publication. The New York Court held that the Connecticut divorce was not a bar to the action, and the United States Supreme Court held that this was correct as, under the circumstances, the Constitution did not require that full faith and credit be given the decree. A divorce granted in a state where the plaintiff alone is domiciled with service by publication or some form of substituted service but without personal service on the defendant may be operative in the state granting the divorce, but it need not be recognized in other states.

The divorces obtained by the petitioners in actions in Nevada against North Carolina citizens, with service by publication in one case and personal service outside the state in the other, clearly come within the scope of *Haddock* v. *Haddock*, and recognition is not required by the Federal Constitution. Inasmuch as the North Carolina courts are not required to recognize the divorce decrees, they are equally at liberty to deny the validity in North Carolina of the subsequent Nevada marriage.

The case of *Haddock* v. *Haddock* cannot be distinguished, as suggested by the petitioners, on the ground that it was concerned only with property rights. The action in that case was to obtain a legal separation, which directly presented the question whether the marriage ties between the plaintiff and defendant subsisted in New York or had been destroyed by the Connecticut decree. The existence of the marital status, itself, was involved, not merely rights *in personam*.

The case of *Davis* v. *Davis*, 305 U. S. 32, 59 Sup. Ct. 3, 83 L. ed. 26, cited by petitioners, is not at variance with the decision of the North Carolina Supreme Court in the instant case. In that case, it was merely held that a defendant who appeared and actively contested the jurisdiction of a foreign court could not collaterally attack the finding by such court that jurisdictional facts existed. The defendants in the di-

vorce actions instituted by petitioners in Nevada made no appearance at all.

Atherton v. *Atherton*, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. ed. 794, is not in point, for the divorce decree in that case was granted in the state of matrimonial domicile.

In *Loughran* v. *Loughran*, 292 U. S. 216, 54 Sup. Ct. 684, 78 L. ed. 1219, it was merely held, as a matter of local policy, that a foreign marriage valid in the state in which it was celebrated would be recognized in the District of Columbia, although one of the parties, under a divorce decree obtained in the District of Columbia, could not have been validly married in the District. The decision with respect to the marriage is not based on the full faith and credit clause.

State decisions, cited by the defendant, in which recognition is given to foreign *ex parte* divorce decrees are not in point, as under *Haddock* v. *Haddock*, a state may, but is not required, to recognize a divorce decree obtained in a state other than that of matrimonial domicile and in which the defendant is not personally served and makes no appearance.

Respectfully submitted,

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